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No. 89-525

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AHMADE RATEB POPAL,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTRODUCTION

In light of *Gomez* v. *United States*, 109 S.Ct. 2237 (1989), respondent's brief in opposition does not dispute that the magistrate who selected the jury that tried and convicted petitioner had no constitutional or statutory authority to do so. Nor does respondent dispute that the issues raised in this case are significant and should be resolved by this Court. Rather, respondent advances three unpersuasive arguments why *certiorari* should be denied.

ARGUMENT

I. Respondent argues preliminarily that the petition is procedurally flawed because petitioner's counsel "consented" at a pretrial status conference, held *in petitioner's absence*, to jury selection by a magistrate, and because petitioner then did not raise the issue in the court of appeals. However, counsel's purported "consent" is not a procedural flaw, but relates directly to the substantive issue at the heart of Mr. Popal's petition: whether the jurisdictional defect recognized in *Gomez* is waivable and, if so, whether the defendant must personally make such a waiver knowingly, voluntarily, and in writing. The argument that *certiorari* should be denied on the basis of the casual waiver procedure conducted in petitioner's absence begs the question of what procedure, if any, constitutes a waiver under *Gomez*.

Secondly, as respondent concedes, the court of appeals agreed to review petitioner's untimely motion for rehearing of his appeal, which raised the precise issues raised herein. Thus, respondent's claim (Brf. in Opp. at 4) that the magistrate issue was not raised in the court of appeals is incorrect. Respondent has cited no case holding that a party is precluded from raising an issue in this Court that it first raised in the court of appeals in a petition for rehearing as opposed to its opening brief. Moreover, the new rule recognized in *Gomez* must be applied retroactively to all cases pending on direct review or not yet final. *See Griffith* v. *Kentucky*, 479 U.S. 314 (1987). Having sought retroactive application of *Gomez* in the court of appeals and having been denied, petitioner is plainly entitled to seek relief in this Court.[1]

[1] Petitioner's rehearing petition in the court of appeals, which was pending when his petition for certiorari and supplemental brief were filed, was denied without opinion on November 21, 1989. At that time, petitioner notified this Court by letter and withdrew his motion to defer consideration of this petition.

Respondent, seeking to minimize the conflict between the second and the ninth circuits, suggests that *United States* v. *France*, 886 F.2d 223 (9th Cir. 1989), was decided only on futility of objection grounds. Govts. Brf. at 3 and n.3. In fact, the ninth circuit's opinion holds both that objection would have been futile *and* that *Gomez* was decided on broad, jurisdictional grounds. The court stated:

> [W]e find absolutely no indication in the tenor or the text of the opinion [in *Gomez*] to suggest that the Court relied on, or did more than note—in the interest of providing a full and accurate description of the facts before it—the fact the petitioners had objected to the magistrate's conducting voir dire . . . . We do not think . . . that the Court intended to limit the broad, definitive rule it announced to the precise facts before it.

886 F.2d at 227. *See United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1546 (2d Cir. 1989) (Altimari, J., dissenting) ("consent of the defendant cannot enlarge those powers of the office not granted by the Federal Magistrates Act"), petition for certiorari pending, No. 89-5949; *United States* v. *Baron*, ___ F.Supp. ___, 1989 WL 115625 (D. Hawaii Oct. 10, 1989) ("This Court reads *Gomez* as prohibiting a magistrate from conducting voir dire, even with a defendant's consent"; conviction set aside on collateral attack even though the defendant did not contemporaneously object). *But see United States* v. *Rubio*, ___ F. Supp. ___, 1989 WL 115164 (D. Del. Sept. 26, 1989) (*Gomez* not applied retroactively on collateral attack where the defendant had failed to contemporaneously object).

The Government also incorrectly suggests that objection in petitioner's case would not have been futile because the law in the second circuit was not "settled" at the time

of trial. Govts. Brf. at 3 n.3. On October 24, 1988, when jury selection in petitioner's case was held, the controlling authority in the second circuit was *United States* v. *Garcia*, 848 F.2d 1324 (2d Cir. 1988). *Certiorari* to review that case was not granted until after petitioner's trial. *See Gomez* v. *United States*, 109 S.Ct. 782 (1989) (order granting *certiorari*). Petitioner could not have been expected to voice a seemingly futile objection to a procedure that had been routinely followed in the Eastern District of New York and specifically upheld by the court of appeals. *See generally Reed* v. *Ross*, 468 U.S. 1, 15-19 (1984).

II. Respondent maintains that *Gomez* is limited to "situations in which the district court delegated jury selection to a magistrate without the defendant's consent." Govts. Brf. at 4. To establish "consent" in this case, respondent then relies upon the statement by petitioner's counsel during the first status conference in the case, when petitioner was not present, that *counsel* had no objection to such a procedure.[2] Respondent points to nothing in the record to establish that *petitioner* was ever informed that he had a right to jury selection by a district judge, that he could object to jury selection by a magistrate, or that his right to an Art. III judge had been "waived" on his behalf by his counsel. Indeed, respondent does not dispute that, after defense counsel made his statement in his client's absence, the matter was never again discussed.

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[2] While it is true that petitioner's counsel "waived" petitioner's presence at this initial status conference, counsel had no reason to suspect that the subject of jury selection before a magistrate would be raised at such an early juncture. Nor, of course, did petitioner, who was supposed to have been produced in court, have any opportunity to consider whether to waive his own presence.

This Court should summarily reject respondent's contention that a casual "waiver" by a defendant's counsel outside the defendant's presence can somehow suffice to take a case outside *Gomez's* ambit. *Gomez* holds that a magistrate has no authority to select a jury in a felony trial, both because Congress withheld *any* felony trial jurisdiction for magistrates, and because, as a prerequisite for magistrates to exercise *any* criminal trial jurisdiction, the defendant must *personally* execute a specific, *written* consent. *See* discussion in Pet. at 7-8. *Gomez* also repeatedly refers to legislative history establishing Congress' determination to require a knowing, personal consent by the litigant before the latter may be deprived of his constitutional right to trial before an Art. III tribunal. 109 S.Ct. at 2244-45 and nn. 21, 24. Respondent simply fails to address how petitioner could have vicariously waived his "basic" right to the presence of an Art. III judge during jury selection without even being informed that he had done so.

To justify the casual "consent" process followed in this case, respondent argues that the right at stake was not significant enough to require the defendant's express, personal waiver. But *Gomez* held that a defendant's right to the presence of a "person with jurisdiction to preside" is such a "basic" fair trial right that the harmless error doctrine does not apply. *Gomez*, 109 S.Ct. at 2248. Indeed, the Court equated a felony defendant's right to the presence of a competent tribunal at trial with other bedrock structural protections, such as the right to an impartial judge or jury. *Id.* The Court has always required waiver of such basic structural prerequisites of a constitutionally fair trial to be knowingly and intelligently made by the *defendant*. *See* cases cited in Pet. at 9 and discussed in *Schneckloth* v. *Bustamonte*, 412 U.S. 218,

237-41 (1973). Congress, too, viewed the right to an Art. III tribunal as fundamental, and explicitly required that waiver of this constitutional right be express, knowing, personal, and, in criminal cases, written. Contrary to respondent's suggestion (Brf. at 5), waiver of such a basic, structural trial protection is not at all like waiver of an evidentiary objection during trial, an instantaneous decision that necessarily must be made by counsel in most instances, *see Wainwright* v. *Sykes*, 433 U.S. 72, 92-93 (Burger, C.J. concurring), or like trained appellate counsel's strategic determination to omit a point on appeal, *see Jones* v. *Barnes*, 463 U.S. 745 (1983).

In its effort, despite *Gomez*, to trivialize the significance of the right that petitioner is said to have vicariously waived, respondent minimizes the right as merely "statutory" in origin. Brf. at 5 n.4. But the right to trial before a life-tenured, district judge is created by Art. III of the Constitution, not the Federal Magistrates Act. The Act's limited trial provisions merely permit a defendant, in misdemeanor cases, to waive this right. But withholding from magistrates *any* felony trial jurisdiction, the Act *precludes* a felony defendant from waiving his Art. III trial right in felony cases.

III. Respondent further argues that the defect in assigning jury selection to a magistrate did not involve "subject matter jurisdiction," and therefore was waivable. Respondent advances the curious argument that the Court's use of the word "jurisdiction" was addressed to the district court's lack of "statutory authority" to assign jury selection to the magistrate, as opposed to the magistrate's own lack of power to act. Brf. at 6. This is a meaningless, and an incorrect, distinction.

The Court's repeated use of the terms "jurisdiction", "power", and "authority" in *Gomez* clearly related to the

concept of "subject matter jurisdiction." The issue in *Gomez* was whether Congress' determination to withhold from magistrates jurisdiction over the subject matter of federal felony trials included the jury selection phase of such felony prosecutions. The Court noted that the Magistrates Act had created trial jurisdiction for magistrates over the subject matter of civil cases and misdemeanors, but that, as the Government conceded, it had withheld any "authority" for magistrates to try felonies. *See Gomez*, 109 S.Ct. at 2245 and n.22. *Gomez* determined that Congress did not intend to empower magistrates to preside over the subject matter of jury selection for a felony trial, and thus that district courts could not properly assign such a function. It is irrelevant that the federal court that "delegates" authority to a magistrate has subject matter jurisdiction. Once the assignment is made, it is the *magistrate*, not the court, which purports to exercise felony trial "jurisdiction."

In effect, respondent argues that, so long as the tribunal that enters judgment has jurisdiction to do so, its delegation of the proceedings leading up to judgment to a tribunal lacking authority to act is not a jurisdictional defect. But surely a district court, even with a defendant's explicit consent, could not assign the full trial of a felony case to a non-Art. III officer while reserving authority to enter judgment. The proceedings would be void because the person presiding at the pre-judgment proceedings would have lacked constitutional or statutory authority to act. Similarly, where such a person lacking "jurisdiction to preside," *Gomez*, 109 S.Ct. at 2248, selects the jury, the proceeding is void. Jury selection is a "critical stage[] of a criminal trial." *Id.* The district court may not enter a judgment of conviction based upon a verdict returned by such an illegally-constituted body.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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